

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

D.H. EVERS, etc.,

Plaintiff,

vs.

PURSE SEINE VESSEL OWNERS
ASSOCIATION, et al.,

Defendants and Counter-Claimants,

D.H. EVERS, etc.,

Third-Party Plaintiff,

vs.

ROBERT KEHOE, et al.,

Third-Party Defendants.

Case No. CV 09-00791

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

**Note for motion calendar:
Friday, October 30, 2009**

MOTION

Plaintiff D.H. Evers on behalf of Underwriting Members of Syndicate 535 at Lloyd's ("Syndicate 535"), moves for summary judgment pursuant to Fed. R. Civ. P. 56 (c). Syndicate 535 requests a declaratory judgment that it owes nothing to defendants and an order dismissing all defendants' counterclaims because no action was commenced within one year as required by the applicable policy of insurance. Syndicate 535 bases this motion on the files and records herein, the subjoined memorandum of points and authorities, and the declaration of Nicolas J. Vikstrom (hereafter "Vikstrom Dec.") with exhibits thereto.

Case No.: CV 09-00791

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 1

KEESAL, YOUNG & LOGAN
1301 FIFTH AVENUE, SUITE 1515
SEATTLE, WASHINGTON 98101
(206) 622-3790

1 **MEMORANDUM OF POINTS AND AUTHORITIES¹**

2 **I. FACTS**

3 Syndicate 535 and third-party defendant National Casualty are insurers who
4 each covered a 50% share of the \$1 million marine protection and indemnity policy
5 of insurance at issue in this case. The defendants are policy insureds Purse Seine
6 Vessel Owners Association ("PSVOA") and F/V Aleutian Spirit, Inc. ("ASI").
7 Syndicate 535 has paid its 50% share of the \$1 million policy limit applicable to the
8 underlying seaman's personal injury claim and filed this action to obtain a
9 declaratory judgment that nothing more is owed to the defendants.

10 PSVOA is a Washington corporation and has its primary place of business in
11 Seattle, Washington. Defendants' Answer, Dkt. no. 8 at 2, ¶3. PSVOA administers
12 and manages the Seine Vessels' Reserve ("SVR"). Exs. B and C to Vikstrom Dec.
13 (Seine Vessels' Reserve Articles of Association and brochure).

14 SVR is a voluntary association of fishing vessel owners who are members of
15 the PSVOA. SVR provides insurance coverage to its member vessel owners and
16 purchases reinsurance from outside insurers to avoid excess losses and preserve
17 member surplus. SVR provides the investigation and adjustment of claims, and
18 maintains a fund for the payment of losses or claims made by or against its
19 members. SVR is a Washington association and conducts business under the
20 authority of the RCW 48.01.050. Pursuant to SVR's Articles of Association, SVR's
21 Board of Trustees and the PSVOA jointly administer and manage the SVR.
22 Furthermore, PSVOA serves as the "Manager" of SVR and has the authority and
23 responsibility to among other things, keep records of all business transactions,
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25 ¹ As the court is painfully aware, the parties have filed several other motions focused upon third-
26 party claims that are noted for the court's October 16, 2009, motion calendar. It should be noted that
27 if the court grants this motion brought by Syndicate 535, then all of the third-party claim motions
28 would effectively be rendered moot.

1 investigate and adjust all claims, and establish all general policy guidelines for the
2 operation of SVR. Ex. C to Vikstrom Dec. (Seine Vessels' Reserve Articles of
3 Association).

4 As defendants have admitted in their answer to the amended complaint,
5 PSVOA sought marine insurance for PSVOA/SVR members through the services of
6 its Seattle broker, Acordia (nka Wells Fargo, but referred to herein as Acordia.)
7 Answer, Dkt. no. 8 at 2-3, ¶5. PSVOA obtained marine insurance naming itself,
8 Purse Seine Services, Inc. (an affiliate of PSVOA), SVR, and individual PSVOA/SVR
9 member vessel owners, such as defendant ASI, as insureds for the policy period
10 October 1, 2001 to October 1, 2002, under Policy No. PMH2045/01 (the "Policy").
11 The Policy was actually a collection of several separate types of marine insurance
12 coverages, each having their own policies setting out terms, limits, and conditions of
13 coverage. One of those was marine protection and indemnity insurance provided
14 under "SP-38 Protection & Indemnity Clauses." Ex. A to Vikstrom Dec. (Policy
15 WF00081-139, and WF 00111-115 in particular).

16 ASI is an Alaska company and member of the PSVOA that insured the F/V
17 ALEUTIAN SPIRIT through PSVOA's insurance program as embodied in the
18 Policy. Amended Complaint, Dkt. no. 3 at 2, ¶¶4-5; Answer, Dkt. no. 8 at 2-3, ¶¶4-5
19 and Ex. 2 attached thereto.

20 PSVOA and ASI were bound by the terms, limits, and conditions contained
21 within the Policy specifically including lines 92-95 of the "SP-38 Protection &
22 Indemnity Clauses" of the marine protection and indemnity insurance, as follows:

23 No action shall lie against this Company for the recovery of any loss
24 sustained by the assured unless such action is brought within one year
25 after the entry of any final judgment or decree in any litigation against
26 the assured, or in the event of a claim without the entry of such final
judgment or decree, unless such action is brought within one year from
the date of the payment of such a claim.

27 (Emphasis added.) Ex. A to Vikstrom Dec. at WF 00114. That clause required any
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1 assured having any claim against Syndicate 535 to bring an action within one year
2 of payment of an underlying claim where no final judgment had been entered in an
3 underlying case. That describes the exact situation at play here.

4 In April 2002, crewmember Jason Miller of the F/V ALEUTIAN SPIRIT was
5 injured while using a gangway to that vessel. He sued the vessel owner, ASI, in
6 Alaska to recover damages for his injury (hereinafter "Miller Claim"), and the SP-38
7 Protection & Indemnity Clauses covered the Miller Claim. Amended Complaint,
8 Dkt. no. 3 at 2-3, ¶10; Answer, Dkt. no. 8 at 3, ¶10.

9 As stated above, Syndicate 535 was one of two underwriters who each covered
10 a 50% share of the \$1 million coverage under the SP-38 Protection & Indemnity
11 Clauses. Coverage for the Miller Claim was subject to a deductible of \$2,500 per
12 occurrence and a policy limit of \$1 million. Amended Complaint, Dkt. no. 3 at 2, ¶¶
13 6-8; Answer Dkt. no. 8 at 3, ¶¶ 6-8.

14 As PSVOA's executive director, Rob Zuanich, candidly admitted in a memo to
15 PSVOA board of directors in May of 2009, PSVOA appointed its own Seattle in-
16 house counsel, Robert Kehoe, to defend ASI in the Miller Claim. Ex. D to Vikstrom
17 Dec. (Zuanich memo, at PSVOA 00070). PSVOA, acting by Zuanich and in-house
18 counsel Kehoe, planned the defense of the Miller Claim and reported developments
19 and litigation strategy to the lead underwriter, National Casualty, through its
20 affiliate "Scottsdale Insurance Company" in Arizona. Exs. D and E to Vikstrom
21 Dec. (Zuanich memo PSVOA 00070-73, and Litigation Plan WF 00519-527).

22 The Miller Claim was tried in court in Alaska in 2007, resulting in a net
23 damage award for Jason Miller of \$768,417 as set forth in the trial judge's Amended
24 Findings of Fact and Conclusions of Law dated August 22, 2007. ASI's liability to
25 Miller after trial included the damages of \$768,417, plus interest, costs, and
26 attorneys' fees that had not yet been set by the trial judge (hereafter "Miller
27 Liability"). Exs. D and F to Vikstrom Dec. (Zuanich memo at PSVOA 00071 and
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1 Amended Findings at WF 00004-24). By that time, some of the \$1 million policy
2 limit had already been drawn down to pay costs and expenses incurred to
3 investigate and defend the Miller Claim. Amended Complaint, Dkt. no. 3 at 3, ¶13;
4 Answer, Dkt. no. 8 at 3, ¶13.

5 It was apparent to PSVOA a final judgment on the total Miller Liability
6 would push beyond the \$1 million policy limit. Ex. D to Vikstrom Dec. (Zuanich
7 memo at PSVOA 00071). Before a judgment was issued by the court on the full
8 amount of the Miller Liability, a post-trial settlement was agreed, resulting in the
9 lump sum payment of \$1 million by PSVOA/SVR to Jason Miller in December of
10 2007 (hereafter "Miller Settlement"). Exs. D and G to Vikstrom Dec. (Zuanich
11 memo at PSVOA 00071 and Miller Claim payment ledger at WF 00161).

12 By PSVOA's own rendering, the \$1 million Miller Settlement plus other
13 expenses and payments incurred on the Miller Claim amounted to \$1,253,642. Ex.
14 D to Vikstrom Dec. (Zuanich memo at PSVOA 00071). PSVOA/SVR paid the entire
15 \$1 million Miller Settlement in December of 2007, allegedly relying upon a promise
16 "that underwriters would agreed (sic) to pay all amounts in excess of the \$1 million
17 policy limit." Exs. D and G to Vikstrom Dec. (Zuanich memo at PSVOA 00071 and
18 Miller Claim payment ledger at WF 00161). ASI paid nothing to satisfy the Miller
19 Settlement. Ex. I to Vikstrom Dec. (defendants' "Supplemental Initial Damages
20 Disclosure" explaining in ¶C that PSVOA funded the Miller Settlement and ASI did
21 not).

22 It is undisputed that Syndicate 535 has paid its entire 50% share of the \$1
23 million policy limit. Amended Complaint, Dkt. no. 3 at 3, ¶19; Answer, Dkt. no. 8 at
24 5, ¶19. As PSVOA and ASI admit in their answer, they were aware no later than
25 July of 2008 that Syndicate 535 did not agree to pay anything beyond the 50% share
26 of the \$1 million policy limit. Answer, Dkt. no. 8 at 6, affirmative defenses ¶8; see
27 also Ex. H to Vikstrom Dec. (memo to defendants' broker Acordia confirming that
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Syndicate 535 will pay nothing beyond the 50% share of the \$1 million policy limit).
Syndicate 535 has never agreed with PSVOA's contention that there exists any
obligation to pay anything beyond the 50% share of the \$1 million policy limit in
connection with the Miller Settlement.

In June 2009, 18 months after PSVOA/SVR paid the Miller Settlement,
Syndicate 535 filed this action seeking a declaratory judgment that it had no
obligation to pay anything further. In response, PSVOA and ASI contend that
Syndicate 535 must pay an additional \$131,460.50 plus "punitive damages." Ex. I
to Vikstrom Dec. (defendants' "Supplemental Initial Disclosures"). They base that
contention on their allegation that lead underwriter National Casualty expressly
waived the \$1 million policy limit. Answer, Dkt. no. 8 at 6, affirmative defense ¶4.

Even assuming for purposes of this motion both that the waiver allegation is
true and that National Casualty actually had the authority to waive the policy limit
on behalf of Syndicate 535 (these contentions are not admitted to be true), it is
undisputed that neither PSVOA nor ASI filed an action within one year of when
PSVOA/SVR paid the Miller Settlement in December of 2007. Amended Complaint,
Dkt. no. 3 at 4, ¶26; Answer, Dkt. no. 8 at 5, ¶26. Thus, PSVOA and ASI failed to
pursue any action within the time limit expressly set forth in the SP-38 Protection
& Indemnity Clauses.

II. ARGUMENT

A. Summary Judgment Standard

Summary judgment is proper when "the pleadings, discovery and disclosure
materials on file, and any affidavits show that there is no genuine issue as to any
material fact and that the movant is entitled to judgment as a matter of law." Fed.
R. Civ. P. 56(c). An issue is genuine only if there is a sufficient evidentiary basis on
which a reasonable fact finder could find for the non-moving party, and a dispute is

1 material only if it could affect the outcome of the suit under governing law.

2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

3 **B. Washington Law Governs the Marine Insurance Policy Issue**
4 **Presented.**

5 **1. State Law Applies When There Is No Established Federal**
6 **Maritime Rule Addressing the Issue in Question.**

7 This case involves the enforcement of a time for suit clause in a marine
8 insurance policy. Although the court has admiralty jurisdiction of this matter
9 under 28 U.S.C. § 1331(1), marine insurance contract issues are governed by state
10 law unless there is an established federal maritime rule that addresses the issue or
11 there is a need to create one to achieve uniformity in admiralty practice. *Yu v.*
12 *Albany Insurance Co.*, 281 F.3d 803, 806, 2002 A.M.C. 660 (9th Cir. 2002). There is
13 no well established federal maritime rule regarding the enforcement of time for suit
14 clauses in marine insurance policies. Therefore, state law necessarily governs the
15 enforcement of the clause unless a need to create a uniform federal rule is
16 recognized.

17 **2. The Law of the State Having the “Most Significant**
18 **Relationship” With the Insurance Transaction and the**
19 **Parties Applies.**

20 Under well established case law, this court will determine which state law
21 applies by “ascertaining and valuing points of contact between the transaction
22 [giving rise to the cause of action] and the states or governments whose competing
23 laws are involved.” *American Home Assurance Co. v. L&L Marine Service, Inc.*, 153
24 F.3d 616, 619 (8th Cir. 1998) (applying the “most significant relationship” choice of
25 law analysis) (citing *Advani Enterprises, Inc. v. Underwriters at Lloyd’s*, 140 F.3d
26 157, 162 (2nd Cir. 1998) (quoting *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953)).

27 The Ninth Circuit made it clear in *Aqua-Marine Constructors, Inc. v. Banks*,
28 110 F.3d 663, 674 (9th Cir. 1997), that the “most significant relationship” choice of
law analysis is the law of this circuit in a marine insurance case. Defendants

1 expressly agree that *Aqua-Marine* sets out governing choice of law analysis (as they
2 went so far as to cite it for that purpose in their Answer, Dkt. no. 8 at 5, affirmative
3 defenses ¶1, lines 25-26).

4 The choice of law analysis performed to determine which state has the “most
5 significant relationship” with the transaction and parties follows a comprehensive
6 approach laid out at *Restatement (Second) of Conflict of Laws* § 188. *Aqua-Marine*,
7 110 F.3d at 674; accord *American Home*, 153 F.3d at 619. That section reads as
8 follows:

9 188. Law Governing in Absence of Effective Choice by the Parties

10 (1) The rights and duties of the parties with respect to an issue in
11 contract are determined by the local law of the state which, with
12 respect to that issue, has the most significant relationship to the
transaction and the parties under the principles stated in § 6.

13 (2) In the absence of an effective choice of law by the parties (see §
14 187), the contacts to be taken into account in applying the principles
15 of § 6 to determine the law applicable to an issue include:

16 (a) the place of contracting,

17 (b) the place of negotiation of the contract,

18 (c) the place of performance,

19 (d) the location of the subject matter of the contract, and

20 (e) the domicile, residence, nationality, place of incorporation and
21 place of business of the parties.

22 These contacts are to be evaluated according to their relative
23 importance with respect to the particular issue.

24 (3) If the place of negotiating the contract and the place of
25 performance are in the same state, the local law of this state will
26 usually be applied, except as otherwise provided in §§ 189-199 and

3. **Washington Has the Most Significant Relationship with the Insurance Transaction and Policy.**

PSVOA and SVR are Washington entities. ASI joined PSVOA/SVR to obtain the insurance at issue through the services of Seattle broker, Acordia, which placed the insurance with Syndicate 535 in London. PSVOA alone paid the Miller Settlement which put Miller Claim payments beyond the \$1 million policy limit, setting the stage for PSVOA's desire to recover additional money from Syndicate 535. Notwithstanding all of that, defendants contend that Alaska law should apply because ASI is an Alaska company, it was the named defendant in the underlying Miller Claim, and the Miller Claim was litigated in Alaska. Going through the analysis laid out in *Aqua-Marine* and *Restatement (Second) of Conflict of Laws* § 188, however, it becomes quite clear that Washington has the most significant relationship with the insurance and parties in the case. Therefore, Washington law applies.

Before analyzing each of the five factors spelled out at *Restatement (Second) of Conflict of Laws* § 188 (2), it is important to note that the factors are to be analyzed with reference to the specific issue presented. The last sentence of § 188 (2) instructs that "These contacts are to be evaluated according to their relative importance with respect to the particular issue."

a) **The place of contracting was Washington and certainly not Alaska.**

The place of contracting was Washington. There is no evidence that would allow anyone to reasonably conclude that it was Alaska.

² Although Washington's own choice of law rules would not apply per force in this case, it is notable that Washington's choice of law analysis for a marine insurance policy is similar to the Restatement approach. "[T]he law of the place where the contract is entered into controls the determination of the rights and liabilities of the parties thereunder." *Williams v. Steamship Mutual Underwriting Ass'n*, 45 Wn.2d 209, 229 (1954).

1 In their own answer, PSVOA and ASI admit that PSVOA, based here in
2 Seattle, obtained the Policy including the SP-38 Protection & Indemnity Clauses at
3 issue for the benefit of itself, its Washington affiliates SVR and Purse Seine
4 Services, Inc., and its various member vessel owners (one of which was ASI)
5 through PSVOA's insurance broker Acordia here in Seattle. Ex. A to Vikstrom Dec.
6 (Policy cover sheet on Acordia paper, WF00081); Answer, Dkt. no. 8, at 2-3, ¶5, and
7 at 7-8, ¶6. PSVOA and ASI have admitted that Syndicate 535 is a Lloyd's syndicate
8 based in London. Amended Complaint, Dkt. no. 3 at 1, ¶2; Answer, Dkt. no. 8 at 1,
9 ¶2.

10 In addition to those points, the Policy itself states in relevant part at the
11 bottom of page 1 of 59, "this Policy shall not be valid unless countersigned by a duly
12 authorized representative of the Company." Beneath that, the Policy was expressly
13 "Countersigned at Seattle, Washington," with that underlined location having been
14 written by hand next to the signature of the "Authorized Representative." Ex. A to
15 Vikstrom Dec., WF00081.

16 Moreover, the one and only address that appears on the SP-38 Protection &
17 Indemnity Clauses specifically is PSVOA's address in Seattle. Ex. A to Vikstrom
18 Dec., WF00113 at lines 3-4.

19 There was no direct contact whatsoever between Syndicate 535 and ASI
20 during the formation of the Policy. Alaska simply had no connection to the place of
21 contracting.

22 b) **The place of negotiation was Washington, and**
23 **possibly England, but certainly not Alaska.**

24 PSVOA and ASI plainly stated in their answer that Policy negotiations were
25 made by and through PSVOA's broker in Seattle with not only Syndicate 535 in
26 London but also a Lloyd's broker in London and National Casualty with respect to
27 its 50% participation in the Policy. Thus, it is beyond dispute that the place of
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1 negotiation was Washington, and perhaps England as well. There is no basis,
2 however, for PSVOA and ASI to contend with a straight face that Alaska was the
3 place of negotiation.

4 More specifically, PSVOA and ASI stated in their answer that: PSVOA
5 sought the coverage at issue for its members through Acordia; Acordia also
6 coincidentally had limited authority to bind Syndicate 535 under a separate
7 agreement that Acordia had negotiated with London broker Cooper & Gay Ltd.;
8 Acordia did bind Syndicate 535 to the insurance at issue; and Acordia also obtained
9 the agreement of National Casualty to take on 50% of the insurance risk. Answer,
10 Dkt. no. 8, at 2-3, ¶5, and at 7-8, ¶6.

11 Although PSVOA may have been issued an insurance certificate to show that
12 it was one of the PSVOA members insured under the terms of the Policy (as PSVOA
13 and ASI also state in their answer), such documentation of its status as an insured
14 hardly qualifies of negotiation of the Policy between PSVOA and Syndicate 535.

15 c) **The relevant place of performance was England or**
16 **Washington, but certainly not Alaska.**

17 It is axiomatic that Syndicate 535's performance of its obligations under the
18 Policy, and specifically the marine protection and indemnity insurance at issue
19 under the SP-38 Protection & Indemnity Clauses, was to pay claims as agreed.
20 There is no evidence to support any contention by PSVOA and ASI that Syndicate
21 535 had an obligation to pay any claims in Alaska.

22 First, it is undisputed that Syndicate 535 is a Lloyd's syndicate based in
23 London. Naturally it would perform its obligations in London, directing payment on
24 claims either to an insured's London broker when there is one or to its foreign
25 broker if there was no London broker.

26 In this case, it is undisputed that Lloyd's broker Cooper & Gay as well as
27 Seattle broker Acordia, were both involved, as indicated in PSVOA and ASI's
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1 statements in their answer. Answer, Dkt. no. 8, at 2-3, ¶5, and at 7-8, ¶6.

2 Second, it is undisputed that PSVOA paid the Miller Settlement that pushed
3 the Miller Claim payments beyond the \$1 million policy limit, and it is PSVOA that
4 seeks to recover a further payment of \$131,461 from Syndicate 535. That is why
5 PSVOA's executive director Zuanich recommended to PSVOA's board in May of this
6 year that PSVOA "Send a request to Lloyd's and Wells Fargo [referring to Syndicate
7 535 and Acordia, nka Wells Fargo] confirming that the remaining \$131,461 owing
8 under the policy is now due and payable" and to "initiate a lawsuit against Lloyd's
9 in the appropriate federal or state court" if confirmation is not received within 10
10 days. Ex. D to Vikstrom Dec. (Zuanich memo, PSVOA 00073).

11 Even assuming for purposes of this motion that Syndicate 535 had an
12 obligation to make any further payment directly to PSVOA (as opposed to a London
13 or Seattle broker), that would be a payment to PSVOA in Washington. ASI did not
14 make any payment on the Miller Settlement, and so there is no basis upon which
15 PSVOA and ASI can legitimately argue that Syndicate 535 could have any
16 obligation to perform by making the further payment sought beyond policy limits to
17 ASI in Alaska.

18 Furthermore, any argument centered upon ASI's identity as an Alaska entity
19 carries no weight. Not only is it undisputed that PSVOA alone (not ASI) paid the
20 Miller Settlement, but after Syndicate 535 filed this lawsuit PSVOA purchased any
21 claims that ASI may have had in any event by an assignment dated July 1, 2009.
22 Answer, Dkt. no. 8, at Ex. 4 thereto. Thus, PSVOA is the only party in real interest
23 with respect to any further recovery sought from Syndicate 535. PSVOA is a
24 Washington entity having its principal place of business here in Washington. Even
25 assuming for argument that there was a further obligation on the part of Syndicate
26 535 to make a further payment and to make it directly to PSVOA, the place of
27 performance would be here in Washington, not in Alaska.

1 d) **The location of the subject matter of the contract**
2 **was Alaska and ultimately Washington.**

3 The subject matter of the contract was insurance of marine protection and
4 indemnity risks as spelled out in the SP-38 Protection & Indemnity Clauses. The
5 named insureds were PSVOA and PSVOA affiliates SVR and Purse Seine Services,
6 Inc. (all Washington entities based here in Seattle) as well as individual certificate
7 holder ASI (Alaska entity based in Alaska). Ex. A to Vikstrom Dec., WB 00081.
8 The particular subject matter of the underlying Miller Claim arose in Alaska and
9 was litigated there, ultimately resulting in the Miller Settlement paid solely by
10 PSVOA and leading to PSVOA's claim for further payment from Syndicate 535.
11 Considering again that PSVOA is a Washington entity based in Seattle, these facts
12 show that the location of the subject matter of the insurance at issue was both
13 Washington and Alaska, but ultimately ending with a claim for further payment by
14 PSVOA here in Washington.

15 e) **The relevant parties are based in Washington and**
16 **England, as ASI is not a relevant party.**

17 It is beyond dispute that the named insureds PSVOA and PSVOA affiliates
18 SVR and Purse Seine Services, Inc. are all Washington entities based here in
19 Seattle. That is reflected on the very first page of the Policy, and their Seattle
20 address is the only address stated in the SP-38 Protection & Indemnity Clauses
21 themselves. Ex. A to Vikstrom Dec., WF 00081, 00113.

22 Furthermore, PSVOA and ASI also admit that Syndicate 535 is a Lloyd's
23 syndicate underwriter based in London. Amended Complaint, Dkt. no. 3 at 1, ¶2;
24 Answer, Dkt. no. 8 at 1, ¶2. The mere fact that ASI was an insured and is an
25 Alaska entity does not allow PSVOA and ASI to gloss over other parties'
26 Washington and England contacts and reach a (false) conclusion that Alaska has a
27 significant interest in having its law apply. Bearing in mind the instruction of
28 Restatement § 188 (2) that "contacts are to be evaluated according to their relative

1 importance with respect to the particular issue,” ASI is a relatively unimportant
2 party. It is only a nominal party both because it did not pay any of the Miller
3 Settlement for which further recovery is sought from Syndicate 535 and because
4 ASI assigned any claims that it had to PSVOA in any event. Thus, PSVOA is the
5 real party in interest insofar as the pursuit of further recovery from Syndicate 535
6 is concerned.

7 Consequently, Washington is the state that has the most significant interest
8 in the resolution of the issue presented. Because ASI only has a nominal role,
9 Alaska’s interest is correspondingly nominal. *Aqua-Marine*, 110 F.3d at 675
10 (California’s interest in having its law apply was minimal considering that the
11 party who was a California resident had become a nominal party when he did not
12 defend the claim against him and his default was entered). Resolution of the issue
13 presented will have no substantial effect on ASI, so there is no significant Alaska
14 relationship.

15 Resolution of the issue will, however, have a substantial effect on PSVOA as
16 the sole party who paid the Miller Settlement and seeks further recovery from
17 Syndicate 535. Accordingly, Washington has a significant interest in having its law
18 apply to its corporate citizen in relation to an insurance policy entered and
19 negotiated in Washington.

20 **C. The One Year Suit Time Limit Must Be Enforced Under**
21 **Washington Law.**

22 The meaning of the one-year time limit set forth in the SP-38 Protection &
23 Indemnity Clauses is unmistakable. Referring to a similar contractual time limit
24 set out in another marine insurance contract, the Supreme Court stated almost 80
25 years ago, “There is no dispute as to the meaning of the provision in the policy. It is
26 that the insurer shall not be liable unless suit is brought within one year of the
27 loss.” *Home Insurance Co. v. Dick*, 281 U.S. 397, 403, 406 (1930). Likewise here,

1 the one-year time limit in the SP-38 Protection & Indemnity Clauses means that
2 Syndicate 535 shall not be liable to any insured unless the insured brings suit
3 within one year from the date of the payment of an underlying claim.

4 The clause is enforceable under Washington law. First, RCW 48.12.200
5 expressly allows for such contractual time for suit clauses so long as the time period
6 is not less than one year.

7 Second, Washington courts have consistently enforced such time for suit
8 clauses in insurance policies. Perhaps the most relevant example is *Pacific Queen*
9 *v. Atlas Assurance Co.*, 1962 A.M.C. 574, 600 (W.D. Wash. 1962). In that case, the
10 Washington Supreme Court enforced a contractual one-year time limit in a marine
11 insurance policy, holding that the insured could not recover because no suit was
12 brought within the one-year time limit.

13 Other examples of Washington cases enforcing similar insurance policy time
14 limit clauses include: *Panorama Village Condominium Owners Ass'n v. Allstate Ins.*
15 *Co.*, 144 Wn.2d 130, 138-39 (2001); *Hassett v. Pennsylvania Fire Ins. Co.*, 150 Wn.
16 502, 508 (1929) (enforcing a one year suit time limitation holding that the provision
17 was "reasonable and valid, and should be enforced by the courts when applicable to
18 any state of facts presented for determination"); *Hefner v. Great American Ins. Co.*,
19 126 Wn. 390, 391 (1923) (reversing lower court and reinstating order granting a
20 nonsuit and dismissing the action because insured failed to bring suit within the
21 contractual one-year time limit); *Wothers v. Farmers Ins. Co.*, 101 Wn. App. 75, 80
22 (2000); *Ashburn v. Safeco Ins. Co.*, 42 Wn. App. 692, 696 (1986).

23 It merits mention that a Washington statute of limitation cannot enlarge a
24 contractual time limit for commencement of an action. *Wothers*, 101 Wn. App. at 80
25 (citing *Yakima Asphalt Paving Co. v. Dep't of Transp.*, 45 Wn. App. 663, 666 (1986)).
26 Instead, as mentioned earlier, RCW 48.18.200 expressly allows for contractual time
27 for suit clauses in insurance policies (specifically including marine insurance) as
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1 long as the time is not less than one year. Washington courts have appropriately
2 observed, therefore, that there is no statutory prohibition on a contractual one-year
3 time for suit clause. "To the contrary, in providing that limitation of a right of
4 action in an insurance policy may not be less than 1 year from the date of loss, RCW
5 48.18.200 impliedly authorizes (but does not require) such a period." *Ashburn*, 42
6 Wn. App. at 696.

7 There is nothing unusual about the enforcement of such clauses under state
8 law. Courts outside of Washington have enforced time for suit clauses in marine
9 insurance policies under the law of other states. *E.g.*, *S.E.A. Towing Co. v. Great*
10 *Atlantic Ins. Co.*, 688 F.2d 1000 (5th Cir. 1982) (Louisiana law); *H.D. Brandyce and*
11 *Co. v. Globe & Rutgers Fire Ins. Co.*, 1930 A.M.C. 7, 8 (N.Y. Ct. of App. 1929) (New
12 York law).

13 The time for suit clause at play here required that any claim to recover from
14 Syndicate 535 be filed within one year from when PSVOA paid the Miller
15 Settlement in December of 2007. PSVOA and ASI admit that they did not bring
16 any such action within one year. Amended Complaint, Dkt. no. 3 at 4, ¶26; Answer,
17 Dkt. no. 8 at 5, ¶26. Accordingly, Syndicate 535 can have no liability to pay
18 anything further to PSVOA or ASI, and their counterclaims are barred as a matter
19 of law because they were filed more than 18 months after PSVOA paid the
20 underlying Miller Settlement.

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28 Case No.: CV 09-00791

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 16

KEESAL, YOUNG & LOGAN
1301 FIFTH AVENUE, SUITE 1515
SEATTLE, WASHINGTON 98101
(206) 622-3790

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DATED this 8th day of October, 2009.

KEESAL, YOUNG & LOGAN

/s/ Robert J. Bocko
Robert J. Bocko, WSBA No. 15724
Nicolas J. Vikstrom, WSBA No. 38420
1301 Fifth Avenue, Suite 1515
Seattle, Washington 98101
Telephone: (206) 622-3790
Facsimile: (206) 343-9529
E-mail: *robert.bocko@kyl.com*
nick.vikstrom@kyl.com

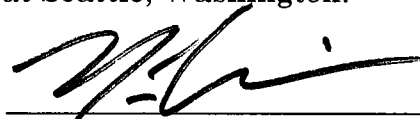
1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify that on the date given below, I electronically filed the
4 foregoing **Plaintiff's Motion for Summary Judgment and [Proposed] Order**
5 **Granting Plaintiff's Motion for Summary Judgment** with the Clerk of the
6 Court using the CM/ECF system which will send electronic notification of such
7 filing to the following persons:

8 Christopher W. Nicoll
9 Chris P. Reilly
10 Nicoll Black & Feig PLLC
11 816 2nd Avenue, Suite 300
12 Seattle, WA 98104-1534
13 Attorneys of record for Defendants
Purse Seine Vessel Owners Association
and F/V Aleutian Spirit, Inc. and Third-
Party Defendant Robert Kehoe

Geoffrey Bridgman
Emily Gant
Ogden Murphy Wallace PLLC
1601 5th Ave, Ste 2100
Seattle, WA 98101-1686
Attorneys for Third-Party Defendant
National Casualty Co.

14 DATED this 8th day of October, 2009, at Seattle, Washington.

15
16 

17 Nicolas J. Vikstrom

18 KYL_SE59280